STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 29, 2014
v	No. 313305 Bay Circuit Court
DAVID JAMES THOMAS, Defendant-Appellant.	LC Nos. 12-010002 FH 12-010239 FH; 12-010242 FH

Before: WILDER, P.J., and FITZGERALD and MARKEY, JJ.

PER CURIAM.

Defendant appeals by right from his conviction following a jury trial of second-degree home invasion, MCL 750.110a(3), two counts of receiving and concealing stolen property valued at more than $1,000 but less than $20,000, MCL 750.535(2)(b), larceny of a firearm, MCL 750.357b, breaking and entering, MCL 750.110, receiving and concealing a stolen firearm, MCL 750.535b(2), felon in possession of a firearm, MCL 750.224f, possession of a controlled substance less than 25 grams, MCL 333.7403(2)(a)(*v*), two counts of possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b, and resisting arrest, MCL 750.81d(1). He was sentenced as a fourth-offense habitual offender, MCL 769.12, to 175 to 360 months' imprisonment for second-degree home invasion and breaking and entering; 76 to 360 months' imprisonment for receiving and concealing a stolen firearm and the two counts of receiving and concealing stolen property valued between $1,000 and $20,000; 150 to 360 months' imprisonment for larceny of a firearm and for felon in possession of a firearm; 120 to 180 months' for possession of a controlled substance and resisting arrest and two years' imprisonment to be served consecutively to the controlled substance and resisting arrest sentences for the felony-firearm convictions. We affirm but remand for resentencing on counts 5,7 and 8 in LC 12-10002.

This case involves robberies defendant allegedly committed between December 24, 2011 and January 4, 2012 at the homes of Scott Wagner and Deniege Barcia. Both testified that their homes were broken into during the 2011-2012 holiday season. Barcia testified that she was on an extended vacation through December 2011. A few days after returning, she noticed that a few things were out of place in her home. After searching her home, she realized that several items were missing, including a wedding ring, a Pandora bracelet, a wristlet purse, a watch, some other pieces of jewelry, and a paintball gun. All together, Barcia estimated that the items were worth

about $2,000. Wagner testified that he discovered on January 4, 2012 that several items were missing from his house and garage, including multiple long-barreled firearms and a .22-caliber handgun. He valued the missing firearms at around $4,000. He also said he was missing a motorcross helmet, a computer, fishing equipment, backpacking equipment, a bow, a boat motor, a chain saw, a fish finder, and a GPS unit. Wagner estimated that these items were worth several thousand dollars. When cleaning up the break-in, Wagner found a prescription drug card in the living room. The card belonged to defendant.

I. MRE 404(B)

Defendant argues that the trial court erred in allowing testimony about three burglaries that he committed in 2005 and 2006. We review a trial court's decision to admit evidence for an abuse of discretion. *People v Adair*, 452 Mich 473, 485; 550 NW2d 505 (1996). An abuse of discretion occurs when the trial court chooses an outcome falling outside the principled range of outcomes. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003).

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case. [MRE 404(b)(1).]

To be admissible under MRE 404(b)(1), the evidence must satisfy three criteria. *People v Sabin*, 463 Mich 43, 55-56; 614 NW2d 888 (2000). First, the evidence must be offered for a proper purpose. *Id.* Second, the evidence must be relevant to a fact of consequence at trial. *Id.* Third, under MRE 403, the danger of unfair prejudice from the evidence must not substantially outweigh its probative value. *Id.* Here, the prosecution met all three requirements.

First, the prosecution did not introduce evidence of defendant's previous convictions to show his poor character or propensity to commit crimes. Rather, it introduced the convictions in to show that defendant had a common scheme, plan, and motive of breaking into an individual's home and stealing their property, selling the property he had stolen, and using the money to purchase drugs. Second, defendant's previous convictions were relevant to a fact of consequence at trial. Defendant maintained throughout this case that he came upon the stolen property in his truck after an acquaintance took his truck without permission. Both of defendant's previous convictions are relevant because they tend to show that he employed a common scheme or plan in breaking and entering structures in order to commit larceny. While both of defendant's convictions occurred several years before this case, that fact goes to the weight, not the admissibility of the evidence. Third, the danger of unfair prejudice from the evidence did not substantially outweigh its probative value. The lower court limited the prosecution to introducing evidence of only two of defendant's previous convictions and clearly instructed the jury on how to use the evidence. There is nothing of record that would undermine the reasonable presumption that the jury followed the lower court's instruction. See *People v Graves*, 458 Mich 476, 485; 581 NW2d 229 (1998).

II. SUFFICIENCY OF THE EVIDENCE

Defendant argues that the prosecution failed to introduce sufficient evidence to sustain his convictions for second-degree home invasion, breaking and entering with intent to commit a larceny, and larceny of a firearm, charges which stemmed from the January 4, 2012 break-in of Wagner's home. "A challenge to the sufficiency of the evidence is reviewed de novo." *People v Malone*, 287 Mich App 648, 654; 792 NW2d 7 (2010). This Court must determine, viewing the evidence in a light most favorable to the prosecution, whether a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *Id*. Circumstantial evidence and reasonable inferences arising from that evidence can constitute satisfactory proof of the elements of a crime, including the defendant's state of mind, knowledge, or intent. *People v Kanaan*, 278 Mich App 594, 619, 622; 751 NW2d 57 (2008).

Second-degree home invasion is proscribed by MCL 750.110a(3):

> A person who breaks and enters a dwelling with intent to commit a felony, larceny, or assault in the dwelling, a person who enters a dwelling without permission with intent to commit a felony, larceny, or assault in the dwelling, or a person who breaks and enters a dwelling or enters a dwelling without permission and, at any time while he or she is entering, present in, or exiting the dwelling, commits a felony, larceny, or assault is guilty of home invasion in the second degree.

Breaking and entering is proscribed in MCL 750.110: "A person who breaks and enters, with intent to commit a felony or a larceny therein, a tent, hotel, office, store, shop, warehouse, barn, granary, factory or other building, structure, boat, ship, shipping container, or railroad car is guilty of a felony . . . ." MCL 750.357b addresses larceny of a firearm: "A person who commits larceny by stealing the firearm of another person is guilty of a felony . . . ."

The prosecution presented sufficient evidence from which a rational fact finder could determine all elements of these crimes were proved beyond a reasonable doubt. First, the prosecution presented uncontroverted evidence that defendant was caught in possession of property stolen from Wagner. Second, the prosecution presented evidence that defendant's prescription drug card was found at the scene of the Wagner robbery. Wagner testified that he did not know defendant. It is reasonable to conclude from this evidence that defendant was in Wagner's home, unbeknownst to Wagner, and dropped his prescription drug card. Third, the prosecution presented evidence that defendant told an acquaintance that he committed the robberies to obtain money for a heroin purchase. Fourth, defendant attempted to use Wagner's credit card without permission to purchase roughly $1,200 worth of merchandise. When he was confronted on it, he told a store employee that Wagner was his boss and had given defendant permission to use the card. Viewed in a light most favorable to the prosecution, this evidence sufficiently proves that defendant broke into Wagner's home and stole his property, including firearms.

III. CHAIN OF CUSTODY[1]

Defendant argues that the prosecution failed to establish a chain of custody for the prescription drug card. This issue was not preserved below, so we review for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

The prosecution is required to establish a foundation for the admission of real evidence by showing a chain of custody. *People v White*, 208 Mich App 126, 129-130; 527 NW2d 34 (1994). The prosecution is not required, however, to show a perfect chain of custody, especially when the real evidence is uniquely identifiable. *Id*. at 130-131.

In this case, Wagner testified that he found the prescription drug card in his house about 24 hours after the initial police investigation and that he delivered the card to the police within a week. This testimony was sufficient to show "to a reasonable degree of certainty" that the card found in Wagner's house and introduced at trial was left by the burglar. *Id.* at 131; see also MRE 901(a)("The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.").

IV. EXCESSIVE CHARGES

Defendant argues that the prosecution abused its discretion in bringing an excessive and unwarranted number of charges. We again review this claim for plain error affecting substantial rights. *Carines*, 460 Mich at 763.

Defendant's "argument that a prosecutor does not have discretion to prosecute the same conduct using all possible statutes is, in general, wrong." *People v Goold*, 241 Mich App 333, 242; 615 NW2d 794 (2000). A prosecutor has broad discretion to bring any charges that are supported by the evidence. *People v Nichols*, 262 Mich App 408, 415; 686 NW2d 502 (2004). This argument is without merit.

V. DOUBLE JEOPARDY

Defendant argues that his convictions for larceny of a firearm and receiving and concealing a stolen firearm violate the prohibition against double jeopardy. Under the federal and state constitutions, a defendant cannot be subject to multiple punishments for the same offense. *People v McGee*, 280 Mich App 680, 682; 761 NW2d 743 (2008). To determine whether punishment for multiple offenses violates the prohibition against double jeopardy, it is necessary to determine whether each offense requires proof of a fact that the other offense does not. *Id*. at 683. If each offense requires proof of an independent fact, no double-jeopardy violation has occurred. *Id*.

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[1] Defendant presents this and the remaining issues in a Standard 4 brief. He also raised a sufficiency of the evidence challenge that we have already addressed.

In *People v Nutt*, 469 Mich 565; 677 NW2d 1 (2004), the defendant was charged with and convicted of second-degree home invasion in Lapeer County in connection with a burglary and theft of firearms. *Id*. at 569. The defendant was subsequently charged with receiving and concealing a stolen firearm in Oakland County after she was found to possess the stolen firearms a few weeks later in her cabin. *Id*. at 569-570. Our Supreme Court ruled that under the same-elements test, a conviction for receiving and concealing a stolen firearm would not violate the prohibition against double jeopardy. *Id*. at 592-593. The Court reasoned that the elements of home invasion were entirely distinct from the elements of receiving and concealing a stolen firearm. *Id*. Simply put, the current test for determining whether multiple convictions violate the prohibition against double jeopardy is whether each statute "'requires proof of a fact which the other does not.'" *Id*. at 578, quoting *Blockburger v United States*, 284 US 299, 304; 52 S Ct 180; 76 L Ed 306 (1932).[2]

The larceny of a firearm statute, MCL 750.357b, reads as follows: "A person who commits larceny by stealing the firearm of another person is guilty of a felony, punishable by imprisonment for not more than 5 years or by a fine of not more than $2,500.00, or both." The elements of larceny are (1) an actual or constructive taking of goods or property, (2) without the consent of the owner and (3) some movement of the property with the intent steal or otherwise deprive the owner. *People v Cain*, 238 Mich App 95, 120; 605 NW2d 28 (1999).

MCL 750.535b(2) provides that "[a] person who receives, conceals, stores, barters, sells, disposes of, pledges, or accepts as security for a loan a stolen firearm or stolen ammunition, knowing that the firearm or ammunition was stolen, is guilty of a felony[.]"

The crime of larceny of a firearm essentially requires possessing and moving the firearm of another with unlawful intent, at which point the firearm is stolen for the purposes of MCL 750.357b. The crime of receiving and concealing a stolen firearm requires committing a specified act with a stolen firearm ("receives, conceals, stores, barters, sells, disposes of"). MCL 750.535b(2). Thus, to commit the crime of receiving and concealing a stolen firearm, the firearm must already be stolen. In other words, for the crime of receiving and concealing a stolen firearm, the prosecution is not required to prove that the defendant was responsible for stealing the firearm, which must be proven with respect to the crime of larceny of a firearm. Because each crime requires an independent factual showing, no violation of the prohibition against double jeopardy occurred.

VI. INEFFECTIVE ASSISTANCE

Defendant argues that he received ineffective assistance of counsel. "Unpreserved issues concerning ineffective assistance of counsel are reviewed for errors apparent on the record."

[2] The Court in *Nutt* addressed double jeopardy in the context of "successive prosecutions." In *People v Smith*, 478 Mich 292; 733 NW2d 351 (2007), the Court explicitly extended its holding in *Nutt* to double jeopardy in the context of "multiple punishments." *Id*. at 324. The issue here is multiple punishments, not successive prosecutions.

People v Lockett, 295 Mich App 165, 186; 814 NW2d 295 (2012). Whether a defendant received ineffective assistance of counsel presents a question of constitutional law reviewed de novo. *Id*.

Under the federal and state constitutions, a criminal defendant has the right to the effective assistance of counsel. *People v Carbin*, 463 Mich 590, 599-600, n 7; 623 NW2d 884 (2001), citing US Const, Am VI; Const 1963, art 1, § 20. "To establish ineffective assistance of counsel, a defendant must show (1) that the attorney's performance was objectively unreasonable in light of prevailing professional norms and (2) that, but for the attorney's error or errors, a different outcome reasonably would have resulted." *People v Werner*, 254 Mich App 528, 534; 659 NW2d 688 (2002). "[T]he defendant must overcome a strong presumption that counsel's performance constituted sound trial strategy." *Carbin*, 463 Mich at 600.

Other than his assertion that counsel failed to call any witnesses and that counsel allowed jurors to remain although they had talked to a member of the pool who was friendly with Wagner, none of the assertions of error set forth in his Standard 4 brief are accompanied by citations to the record. There is, accordingly, noting for the Court to review.

Further, the decision to rest a case on plaintiff's burden of proof is not objectively unreasonable, nor was the decision to let two jurors remain on the jury after it was learned that they overheard a dismissed juror talking about his relationship with Wagner. The first juror told the court that he heard "[t]he man that was upset . . . mention Warner [sic], the name Warner. Other than that, I did not hear any details." The second juror overheard more about the dismissed juror's relationship with Wagner, but he assured the court and the parties that the conversation would not influence him: "I mean, I guess I'm gonna just let the evidence talk to me." Given the lack of information the first juror was privy to and the second juror's assurance that he would not be influenced by what he had overheard, we cannot conclude defense counsel should be faulted for allowing them to remain on the jury.

Defendant also contends that trial counsel was ineffective for failure to obtain two separate evidentiary items. He argues that trial counsel failed to obtain the surveillance recording from the gas station at which he was arrested. But it is unclear how this surveillance recording, if it existed, would have helped defendant's case, as he does not dispute witness testimony about the circumstances of his arrest. Defendant also argues that trial counsel failed to obtain the records of his "Speedway Club Card" showing that he used the card at a gas station about 15 minutes from Wagner's house when the burglary allegedly occurred. The prosecution's theory of the case, however, was that defendant had broken into Wagner's home within a time frame of a few hours on January 4, 2012, while Wagner was out of the house. That defendant may have been 15 minutes away from Wagner's house at some point on that date would have no exculpatory value.

VII. SENTENCE GUIDELINES DEPARTURE

Defendant argues that the trial court erred in departing upward from the sentencing guidelines. The existence of a factor justifying an upward departure is a finding of fact reviewed for clear error. Whether a factor is objective and verifiable is reviewed de novo. Whether a

factor is a substantial and compelling reason to depart from the sentencing guidelines is reviewed for an abuse of discretion. *Babcock*, 469 Mich at 264-265.

A trial court "may depart from the appropriate sentence range established under the sentencing guidelines . . . if the court has a substantial and compelling reason for that departure and states on the record the reasons for departure." MCL 769.34(3). The reasons for departure "must be based on objective and verifiable factors." *People v Horn*, 279 Mich App 31, 43; 755 NW2d 212 (2008). "To be objective and verifiable, a reason must be based on actions or occurrences external to the minds of those involved in the decision, and must be capable of being confirmed." *Id*. at n 6. To be substantial and compelling, a reason must be of considerable worth in determining the length of the sentence and should keenly or irresistibly grab the court's attention. *Babcock*, 469 Mich at 256-257, 272.

In sentencing defendant, the court explained that it had to "make a calculation as to what kind of a threat that [defendant] offer[s]." The court noted that "home invasion is a very serious, very, very serious crime because" of its long-lasting impact on the "emotional well-being" of the victims. The court noted defendant's "extensive juvenile record," that he was at one point on HYTA status, and that he has "been in residential treatment." The court concluded that defendant had "failed every attempt to try and straighten [him] out."

This Court stated in *Horn*, 279 Mich App at 44-45, "[A]lthough a trial court's 'belief' that a defendant is a danger to himself and others is not in itself an objective and verifiable reason, objective and verifiable factors underlying this belief—such as repeated offenses and failures at rehabilitation—constitute an acceptable justification for an upward departure." Thus, the court's focus on defendant's criminal history in considering his rehabilitative potential was proper.

Nevertheless, we find the trial court's general concern for the "emotional well-being" of victims an improper factor to consider when contemplating a sentence departure. Typically, a trial court may consider the impact of the crime on the victim in determining whether to exceed the sentencing guidelines. *People v Girardin*, 165 Mich App 264, 266-268; 418 NW2d 453 (1987). But what the record indicates here is that the court was considering the generalized anxiety felt by hypothetical members of the community to being the victims of a home invasion, not the specific victims of defendant's crimes. Because this reason is not objective and verifiable, it does not support a guidelines departure. Moreover, because we cannot ascertain the extent to which it influenced the court's sentence, we must remand for resentencing, specifically in respect to counts 5, 7 and 8 in LC 12-10002. See *People v Solmonson*, 261 Mich App 657, 670; 683 NW2d 761 (2004).

We affirm defendant's convictions but remand for resentencing. We do not retain jurisdiction.

/s/ Kurtis T. Wilder
/s/ E. Thomas Fitzgerald
/s/ Jane E. Markey